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SUPREME COURT, U.S.

Nos. 03-1164 and 03-1165

In the Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

NEBRASKA CATTLEMEN, INC., ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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Congress enacted the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*, in order to bring a halt to the deterioration of a major sector of the national economy. Acting on the basis of the widely shared understanding that advertising a product stimulates demand for it, Congress established a program of government-directed advertising of beef products. Because producers of a generic product, like beef, are reluctant to pay for advertising on which others can obtain a free ride, Congress imposed a mandatory assessment on the sale of cattle and beef products to fund the advertising program. That government advertising program has been highly successful in stimulating the sale of beef.

Respondents are direct beneficiaries of the generic advertising that is conducted under the Beef Act. They nonetheless claim a First Amendment right to avoid contributing

financially to that program. The First Amendment, however, does not give them such a right. The Beef Act advertising program is constitutional for two reasons. First, it is justified under the government speech doctrine. Second, it satisfies intermediate scrutiny. Respondents' arguments to the contrary are without merit.

I. *UNITED STATES* V. *UNITED FOODS, INC.*, DID NOT RESOLVE EITHER OF THE QUESTIONS PRESENTED HERE

Respondents contend that *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), "controls this case." Resp. Br. 7. In *United Foods*, however, the Court expressly refrained from deciding whether a similar generic advertising program involved government speech because that issue was not raised or resolved in the court of appeals. 533 U.S. at 416-417. Thus, nothing in *United Foods* addresses, much less controls, the proper resolution of the government speech question presented here.

Similarly, the Court in *United Foods* did not resolve the question whether the advertising program at issue in that case satisfied intermediate scrutiny because the government did not seek to justify the program under that standard. 533 U.S. at 409. Here, the government argues that the Beef Act is valid under intermediate scrutiny, and nothing in *United Foods* has any bearing on the resolution of that question.

II. BEEF ACT ASSESSMENTS ARE CONSTITUTIONAL UNDER THE GOVERNMENT SPEECH DOCTRINE

A. Advertising Under The Beef Act Is Government Speech

Respondents argue that advertising under the Beef Act is not government speech. Resp. Br. 29-34. But Congress has specified the basic pro-beef message to be disseminated; it has created a government entity—the Beef Board—to disseminate that message; and it has entrusted ultimate control of the message to a Cabinet Officer—the Secretary of Agriculture. Those structural elements demonstrate that advertising under the Beef Act is government speech.

1. *The government exercises control over advertising under the Beef Act*

Respondents argue that Congress has effectively provided no direction on the nature of the advertising disseminated under the Beef Act. Resp. Br. 30. Through its definition of the term "promotion," however, Congress has determined the central message that all advertising under the Beef Act must convey—that it is desirable to eat beef. See 7 U.S.C. 2902(13) (advertising must "advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the market place"). Congress has given the Beef Board and the Secretary considerable discretion to formulate the advertisements that will communicate that basic message. Advertisements may proclaim "Beef: It's What's for Dinner," J.A. 50, or that beef provides "key nutrients," *ibid.*, or that "it's easier than ever to give people the beef they crave." J.A. 51. But Congress itself has dictated the central pro-beef message contained in those advertisements. That element of legislative control is an important factor in establishing that advertising under the Beef Act is government speech.

Congress has also created a governmental entity—the Beef Board—to disseminate its pro-beef message. While respondents contend that the Beef Board is a private entity (Br. 30-31), that contention conflicts with *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). In that case, the Court held that an entity is a governmental entity for First Amendment purposes when (1) it is created by special law, (2) it is designed to achieve governmental purposes, and (3) a majority of the members are appointed by the government. The Beef Board has each of those characteristics, and respondents do not suggest otherwise.

Instead, respondents argue (Br. 33) that the *Lebron* standard applies only to the question whether an entity is con-

strained by the First Amendment, not to the question whether an entity is governmental when it speaks. But *Lebron* categorically held that the existence of the three specified facts means that an entity "is part of the Government *for purposes of the First Amendment*." 513 U.S. at 400 (emphasis added). Respondents offer no logical basis for drawing the distinction they propose or to justify the proliferation of distinct tests for governmental entity status. Respondents make no effort, for example, to explain how Amtrak could be a governmental entity when it restrains speech but not when it promotes rail transportation. Because the Beef Board is a governmental entity under *Lebron*, its role in the dissemination of advertising under the Beef Act reinforces the conclusion that such advertising is government speech.

The Secretary's ultimate control over the content of advertising under the Beef Act confirms that conclusion. Respondents assert (Br. 30) that the Secretary only "loosely oversees compliance with the statute's conditions." But the Beef Board's budget and all plans, projects, and contracts of the Operating Committee for promotion and research must be affirmatively approved by the Secretary. 7 U.S.C. 2904(4)(C), 2904(6)(A) and (B). In addition, USDA requires the Beef Board to submit all advertising and promotional material funded under the program for approval. J.A. 114, 143, 274-275; see Agricultural Mktg. Serv., USDA, *Guidelines for AMS Oversight of Commodity Research And Promotion Programs* 7 (1994); 7 C.F.R. 1260.150(o) (requiring the Board to "submit to the Secretary such information pursuant to this subpart as may be requested). And USDA has rejected messages that facially meet the statute's conditions. J.A. 118-121, 261, 272. Moreover, in practice, USDA officials work closely with the Beef Board and Operating Committee on the development of particular projects from their inception so that formal disapproval of a project is rarely required. J.A. 111-114, 274.

Respondents cite no evidence to support their unsubstantiated assertion that the Secretary exercises only ministerial review. Congress's vesting of that responsibility in the Secretary is inconsistent with the mere ministerial label. To the contrary, it ensures that the government will be politically accountable for a particular act, here the advertising that is disseminated under the Act.[1]

2. *The district court's government speech determination is not entitled to deference*

Respondents assert that the court of appeals affirmed the district court's determination that advertising under the Beef Act is privately controlled and that the district court's determination is therefore entitled to deference under the two-court rule. Resp. Br. 30. The court of appeals, however, did not affirm the district court's determination. Instead, it held that the government speech doctrine insulates the government only from a First Amendment challenge based upon the government's choice of content, not from a challenge to a requirement to contribute to the funding of government speech. Pet. App. 16a-17a. The two-court rule is therefore inapplicable.

Furthermore, the question whether the government exercises sufficient control of the content of speech to make it government speech is not a question of historical fact. The Secretary is vested with responsibility for and control over the Beef Act program *by law*, and the Act and implementing

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[1] The activities of state beef councils and the National Cattlemen's Beef Association (NCBA) do not detract from the conclusion that advertising under the Beef Act is government speech. See Resp. Br. 31. The Beef Act does not require producers to fund advertising conducted by state councils. Instead, it permits producers who contribute to state programs to obtain a credit for that contribution. 7 U.S.C. 2904(8)(C). The Act also does not require producers to contribute funding to the NCBA. The NCBA has contracts with the Beef Board to develop advertising campaigns. As *Rust* v. *Sullivan*, 500 U.S. 173 (1991), makes clear, the government is free to use such private entities to help develop and disseminate its message.

regulations and guidelines require USDA officials to take certain official actions. When the responsible USDA officials take those actions, the courts must accord them a presumption of regularity and regard them as based on due consideration. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); *Franklin* v. *Massachusetts*, 505 U.S. 788, 824-825 (1992) (Scalia, J., concurring).

In any event, to the extent factual issues are relevant, the question of the nature of the government's control and approval is at most a mixed question of law and fact. This Court exercises de novo review over mixed questions when the applicable legal standard can only be given meaning through its application to particular circumstances. *Ornelas* v. *United States*, 517 U.S. 690, 696-697 (1996); *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985). That is the situation here. The only way for the Court to provide guidance on when a program involves government speech is to assess that issue independently.

In addition, this Court has generally refused to give deference to district court determinations on whether First Amendment standards have been satisfied. Instead, it has conducted an independent examination of the record, without deference to the district court. *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995). There is no reason to follow a different approach here.

Moreover, district court determinations do not warrant deference when they are infected with legal error, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984), and the district court's determination that advertising under the Beef Act is not government speech suffers from that infirmity. In particular, the district court erred as a matter of law when it failed to give weight to Congress's specification of the basic message, Pet. App. 54a-55a, when it failed to apply *Lebron* in determining the status of the Beef Board, *id.* at 53a, and when it failed to give weight

to the Secretary's legal responsibility for approving advertising that is disseminated under the Beef Act, *id.* at 55a.

Finally, the district court's determination is based on subsidiary determinations that are wholly unsupported by the record. For example, the district court based its determination that the Secretary exercises only ministerial review on a USDA officials's purported admission. Pet. App. 55a. That official, however, made no such admission. See U.S. Br. 35 n.7. And the evidence establishes the extensive nature of USDA's involvement in the development and dissemination of advertising under the Beef Act. J.A. 111-116, 268-277, 303-304. Similarly, the district court's determination that the Secretary engages in "pro forma" approval of Beef Board members is baseless. See Pet. App. 55a. The Secretary appoints Board members after receiving at least two nominations for each position. J.A. 116, 267. And before a final selection is made, applications of the nominees are reviewed and background checks are conducted. J.A. 150, 267. The Court should not defer to district court determinations that are wholly unsupported by the record.[2]

3. *Beef Act advertising is government speech under* Rust *v.* Sullivan

Respondents' position that advertising under the Beef Act is not government speech cannot be reconciled with *Rust* v.

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[2] Respondents make other assertions that are equally unsupported by the record. Contrary to respondents' assertion (Br. 31), the Beef Board controls the disbursement of funds to the NCBA. J.A. 234, 259, 278. Similarly, respondents mistakenly claim (Br. 5) that USDA plays no role in the Beef Board's planning cycle. USDA officials attend every meeting at which the budget is discussed; those officials then advise the Secretary, and the Secretary must approve every budget. J.A. 111-113; 7 U.S.C. 2904(4)(C). Respondents' assertion (Br. 5) that implementation of projects begins before the Secretary's approval is not supported by their citations to the record. The record shows that contracts are not effective until they are approved by the Secretary, 7 U.S.C. 2904(6)(A), and contractors receive payments only after incurring costs pursuant to a contract approved by the Secretary. J.A. 234. Finally, as discussed above, the Secretary does not approve Board members in "slate fashion." Resp. Br. 4.

Sullivan, 500 U.S. 173 (1991). There, a statute and agency regulations provided for the furnishing of federal funds to private organizations that employed doctors to counsel patients on a variety of family planning topics, but prohibited them from using those funds to counsel patients on abortion as a method of family planning. The Court rejected a First Amendment challenge to that limitation. The Court has subsequently explained *Rust* as a case that involved government speech for purposes of First Amendment analysis because Congress used the private doctors to communicate a governmental message—*i.e.* to transmit information about, or pursuant to, a governmental program. See *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001).

In the Beef Act, as in *Rust*, Congress has specified the basic message that it wants communicated and has given others discretion to decide how to communicate that basic message. Unlike in *Rust*, however, Congress has established a government entity to disseminate the message and has entrusted a politically accountable Cabinet Officer with ultimate responsibility over the content of the message. The conclusion that advertising under the Beef Act is government speech therefore follows *a fortiori* from *Rust*.

Respondents seek to distinguish *Rust* on the ground that the program at issue in that case involved the use of general tax revenues. Resp. Br. 24. But the decision in *Rust* did not turn on that fact. Rather, *Rust* stands for the proposition that "funds raised by the government" may be used to support the government's "own policies." *Board of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000). And those funds may be raised by "taxes or *other exactions* binding on protesting parties." *Id.* at 229 (emphasis added). The principle established in *Rust* is therefore controlling here.

4. Keller *v.* State Bar *is inapposite*

Respondents argue that *Keller* v. *State Bar*, 496 U.S. 1 (1990), demonstrates that government control of the message is not the overriding factor in deciding whether a program involves government speech. Resp. Br. 32-33. *Keller*, however, does not support respondents' position.

In *Keller*, the Court held that the California State Bar, which participated in an advisory capacity in regulation of the legal profession, was not engaged in government speech when it expressed opinions on issues such as gun control and a nuclear freeze initiative. Respondents' reliance on *Keller* is misplaced because the government did not control the views on those issues expressed by the Bar. Instead, the Bar operated essentially like an autonomous private organization (albeit one in which membership and the payment of dues were mandatory) when it engaged in the expressive activity to which the plaintiffs objected. See 496 U.S. at 5-6 & n.2, 12, 15-16.

Indeed, *Keller* did not involve *any* of the elements of government control that make advertising under the Beef Act government speech. The legislature did not specify that the State Bar should favor gun control or a nuclear freeze. The State Bar was not a governmental entity under *Lebron* because the government did not appoint a majority of the members to the Bar's governing body (see *Keller* v. *State Bar*, 255 Cal. Rptr. 542, 546-547 (1989)).[3] And a politically accountable state official in a traditional state agency did not approve the Bar's positions before they were disseminated. The *Keller* Court's holding that the State Bar was not engaged in government speech is therefore hardly surprising, and it does not remotely suggest that advertising under the Beef Act is not government speech.

Respondents are similarly incorrect in arguing that *Keller* shows that *Lebron* applies only to the question whether an entity is subject to First Amendment constraints, not to the question whether an entity is engaged in government

[3] Although the California Supreme Court found the State Bar to be a "government agency" for state law purposes, the Court held that the Bar's status under state law was not dispositive of the question whether its speech fell within the government speech doctrine for First Amendment purposes. 496 U.S. at 11.

speech, and that the Beef Board is therefore not a governmental entity for purposes of the government speech doctrine. Resp. Br. 33. As discussed above, the State Bar in *Keller* was not a governmental entity under *Lebron*'s three-factor test. Accordingly, *Keller* did not present the question whether an entity that satisfies that test is part of the government for First Amendment purposes when it speaks.

As respondents note (Br. 33-34), a state bar is subject to First Amendment constraints when it performs certain activities. But that is not because it is always a governmental entity when it restrains speech and always a private entity when it speaks, as respondents suggest. Instead, it is because a state bar is ordinarily a private entity, and a private entity engages in state action when state law affirmatively influences or coerces the challenged action, but not otherwise. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 547 (1987); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841 (1982). Thus, in *Baird* v. *State Bar*, 401 U.S. 1 (1971), a decision upon which respondents rely, a state bar's action was subject to First Amendment challenge because the state bar had implemented a rule of the State's highest court. As *Lebron* explains, that state action analysis has no application to the very different question whether an entity is itself part of the government. 513 U.S. at 378. *Lebron*'s three-part test governs that inquiry, and an entity that satisfies that test "is part of the Government for purposes of the First Amendment." *Id.* at 400. Thus, the Beef Board is a governmental entity for purposes of the government speech doctrine, and nothing in *Keller* suggests otherwise.

B. Under The Government Speech Doctrine, The Government May Support A Program Of Government Speech Through Targeted Assessments

1. *The Court's compelled speech cases are inapplicable*

Respondents contend (Br. 34) that, regardless of whether advertising under the Beef Act is government speech, assessments under the Act run afoul of this Court's compelled speech cases—*West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977). In *Barnette*, the Court held that a State could not require public school students to recite the pledge of allegiance and salute the flag. In *Wooley*, the Court held that a State could not require a motorist to display a state motto on his license plate. The Beef Act does not require beef producers to repeat an objectionable message out of their own mouths. Nor does it require them to use their own property to convey a government message. Instead, it requires only that they make a financial contribution to an advertising program that is designed to benefit the industry in which they have voluntarily chosen to participate and to promote transactions in the products they have chosen to sell. *Barnette* and *Wooley* are therefore inapposite here.

Glickman v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997), is dispositive on that point. There, the Court squarely held that *Barnette* and *Wooley* are "clearly inapplicable" to programs that compel funding for generic advertising. *Ibid.*

2. *The Court's compelled funding cases do not limit the government's authority to fund its own speech*

Respondents' reliance (Br. 14-15, 22-23, 34) on *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), is equally misplaced. In that case, the Court held that public employees have a First Amendment right to refrain from fund-

ing a union's ideological speech unless that speech is germane to the union's collective bargaining activities. The Court has applied that compelled funding principle in other contexts in which the government requires an individual to provide financial support for private speech to which the individual objects. *Keller*, *supra* (activities of a state bar); *Southworth*, *supra* (university's student activity program). The Court has never suggested, however, that *Abood*'s compelled funding principle limits the authority of the government to impose assessments to support the government's own speech. To the contrary, the Court has made clear that "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties." *Southworth*, 529 U.S. at 229.

Extending the *Abood* principle to assessments that are used to fund government speech would eviscerate the government speech doctrine. It would mean that taxpayers would have a First Amendment right to refrain from paying taxes to support government policies to which they object. It would mean that students in a public university would have a First Amendment right to refrain from paying tuition to support particular university course offerings to which they object. And it would mean that consumers and cigarette manufacturers would have a First Amendment right to refrain from paying a tax on cigarettes when the revenue from the tax is used to promote the State's message that smoking is unhealthy.

The First Amendment does not require those extraordinary results. To the contrary, the Court has stated that taxpayers have no right to protest the payment of taxes to support government policies to which they object. *Keller*, 496 U.S. at 12-13. Similarly, the Court has expressly indicated that a university may charge tuition to students for course offerings to which the students object. *Southworth*, 529 U.S. at 229. And the Ninth Circuit has recently held—and respondents concede (Br. 37-39)—that a State may impose a tax on wholesale cigarette sales to fund the State's

anti-smoking campaign. *R.J. Reynolds Tobacco Co.* v. *Shewry*, 384 F.3d 1126 (2004). Indeed, it is hard to imagine that the First Amendment would allow a tax on beef to fund government speech explaining the health concerns with excessive beef consumption, but preclude an assessment to fund government speech promoting beef consumption.

Assessments under the Beef Act share characteristics of both the assessment of tuition on students and the tax on the sale of cigarettes. Like the assessment of tuition on students, assessments under the Beef Act are imposed on those who most directly benefit from the government's program. And like the cigarette tax, the Beef Act assessment is imposed on the sale of a product. The constitutionality of those assessments therefore supports the constitutionality of assessments under the Beef Act.

3. *Respondents' attribution theory is unsound*

Respondents understandably shrink from the consequences of literally applying *Abood*'s compelled funding principle to government speech. Instead, they seek to limit the application of *Abood*'s compelled funding principle in the government speech context to situations where the public is likely to attribute the government's message to persons who have funded the program. Resp. Br. 18-21. Applying that limitation, respondents contend that taxes on the general public, requiring students to pay tuition for course offerings to which they object, and a tax on the sale of cigarettes to support an anti-smoking campaign do not violate the First Amendment, *id.* at 23, 38, 41, while assessments under the Beef Act run afoul of the First Amendment. For several reasons, respondents' attribution limitation does not withstand analysis.

First, respondents asserted their alleged attribution injury for the first time in their brief on the merits in this Court. Respondents did not allege that they suffered attribution injury in their complaint; they did not assert that injury in their affidavits; and they did not testify that they suffered attribution injury at trial. The only injury they

asserted is that they were required to fund an advertising message with which they disagreed. See Pet. App. 35a-37a.

Second, respondents' attribution theory is really just a repackaging of their flawed claim that the advertising is not *government* speech. If, as demonstrated *supra*, the advertising here is understood as government speech under the Court's most apposite precedents, there is no reason to conclude that the speech will be mistakenly attributed to private persons who are required to pay assessments used by the government to fund the speech.

Third, respondents' attribution limitation is not grounded in *Abood*. The injury suffered by the individuals in *Abood* was that they were compelled to provide financial support for union positions to which they objected. Nothing in *Abood* suggests that the objecting employees were injured because the public mistakenly attributed the union's positions to them. Nor is such an argument plausible. Members of the public with a basic understanding of how a union formulates its positions would not attribute those positions to every person who pays union dues. Similarly, the injury suffered by the individuals in *Keller* was that they were compelled to provide financial support for positions of the state bar to which they objected. No reasonable member of the public would have concluded that every attorney who pays dues to the state bar supports all the bar's public positions. *Abood* and the decisions applying it therefore do not support respondents' attribution theory. Not surprisingly, respondents do not cite either *Abood* or *Keller* as support for their attribution theory.

Fourth, while attribution concerns have played an important role in some of the Court's cases, none of those cases involved mandatory funding. Instead, attribution concerns have arisen when the government has required a private entity to include another person's message in its own communication, see *Hurley*, *supra*; *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994), or when the government has required a private entity to permit other persons to use its

property for expressive purposes, see *Pruneyard Shopping Ctr.* v. *Robbins*, 447 U.S. 74 (1980). The Beef Act does not require Beef producers to include in their own communications, or display on their own property, messages of other private parties. The Court's attribution cases therefore have no application here.

Finally, to the extent that attribution analysis should play any role in compelled funding cases such as this one, the inquiry should be no more exacting than in an analogous line of cases—Establishment Clause cases where a taxpayer claims that the public would perceive the funding of a particular activity as an endorsement of religion. Indeed, respondents have acknowledged that the Establishment Clause provides the most vibrant protection against compelled funding. Resp. Br. 11. In the Establishment Clause context, the Court asks whether a reasonable observer familiar with the history and context of the program would conclude that the government is endorsing religion. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 654-655 (2002). The analogous inquiry here would be whether the reasonable observer familiar with the history and context of the Beef Act would mistakenly attribute the messages contained in advertising under the Beef Act to each individual beef producer who pays a mandatory assessment that is then used to fund the advertising.

The reasonable observer would not engage in such mistaken attribution. That observer would know that Congress specified the basic message; that it created a governmental entity (the Beef Board) to disseminate the message; that it entrusted the Secretary of Agriculture with the responsibility for and control over the program; that it *required* beef producers to contribute funding to pay for the message; and that the advertisements carry the distinctive logo of the Beef Board. No reasonable observer familiar with those circumstances would mistakenly attribute the messages in the advertisements to individual producers simply because the

producers paid *mandatory* assessments that, subject to government approval, were used to pay for the advertisements.

Some advertisements contain the statement that they are paid for by the producers. J.A. 52. But that statement is entirely truthful and simply identifies the underlying source of funding. Even taken in isolation, it does not suggest that each producer of beef supports the messages contained in advertising under the Beef Act. See Resp. Br. 18. More fundamentally, however, no reasonable observer in possession of *all* the relevant facts could reach that conclusion.[4]

4. *Respondents' rights-benefit distinction is inconsistent with basic First Amendment principles*

Respondents also seek to cabin the application of the *Abood* principle based on a rights-benefits distinction. Respondents specifically contend that there is a constitutional distinction between a program that requires funding as a condition for obtaining a government benefit and a program that requires funding as a condition of pursuing a chosen livelihood. Resp. Br. 22, 40-41. Based on that distinction, respondents argue that it is permissible for a public university to condition a student's admission on the payment of tuition that supports course offerings to which the student objects, while the funding obligation at issue here is unconstitutional. *Id.* at 40-41.

Respondents' rights-benefits distinction conflicts with this Court's First Amendment cases. Indeed, in *Abood* itself, the State imposed an obligation on employees to fund union activities as a condition of obtaining a government benefit—public employment. *Abood* is consistent with numerous decisions that have rejected any rights-benefits distinction in the

[4] In any event, the proper remedy for respondents' alleged attribution injury would be an order enjoining the Secretary and the Beef Board from attributing to them the messages contained in advertising under the Beef Act. The existence of that injury could not justify an order enjoining the collection of all assessments under the program.

First Amendment context. See, *e.g.*, *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 403-404 (1963). Respondents seek to resurrect the very distinction that this Court long ago rejected.

Moreover, respondents' proposed distinction is not supported by practical considerations either. A student who can only afford to attend the local public university can take very little comfort from the university's statement that he is free to attend another school elsewhere. At the same time, a participant in the beef industry can absorb the modest assessment at issue here as part of the cost of doing business, particularly when the assessment is imposed on all his competitors and the advertising is likely to generate additional revenue for that producer whether or not he personally endorses the nature or content of particular advertisements. Respondents' proposed rights-benefits distinction therefore has nothing to commend it.

5. *The Beef Act is subject to democratic checks*

Respondents argue that the Beef Act does not contain sufficient democratic checks to justify application of the government speech doctrine. Resp. Br. 27. The ordinary democratic checks on government speech, however, are also available here. The promotional program under the Beef Act is under the control of a politically accountable official, the Secretary of Agriculture. Congress also has agency oversight responsibility, and all persons, including respondents, may seek a legislative change. Moreover, as producers, respondents have an additional avenue for seeking change. Under the Beef Act, when at least 10% of the beef producers wish to hold a referendum on the continuation of the program, they may ask the Secretary to conduct such a referendum. 7 U.S.C. 2906(b). Those democratic checks are more than sufficient to support application of the government speech doctrine.

Respondents err in asserting (Br. 27 n.16) that the referendum process is ineffective. While respondents claim that they gathered the number of signatures necessary to

trigger a referendum, the Secretary reached a different conclusion. That disagreement provides no basis for respondents' claim that the referendum process is ineffective. Similarly, respondents mistakenly assert (*ibid.*) that the Secretary improperly failed to hold a referendum on the continuation of the pork program. In fact, the Secretary terminated the pork checkoff program after an advisory referendum. Supporters of the program, however, filed a legal action challenging both the counting of the votes and the legal basis for terminating the program. *Michigan Pork Producers Ass'n* v. *Campaign for Family Farms*, 174 F. Supp. 2d 637, 639 (W.D. Mich. 2001). Ultimately, the Secretary settled that case by agreeing not to terminate the program, and that agreement was upheld by the district court. *Id.* at 648.

III. THE BEEF ACT SATISFIES INTERMEDIATE SCRUTINY

A. Respondents contend (Br. 43-45) that the Beef Act cannot be justified under the standard of intermediate scrutiny that is applicable to commercial speech. But the Beef Act increases the amount of speech available and does not restrict the right of any individual to add his own speech. Thus, at the very least, it should not be subjected to any greater scrutiny than restrictions on commercial speech. Indeed, six Justices have already concluded that generic advertising programs are constitutional if they satisfy intermediate scrutiny. See *Wileman*, 521 U.S. at 491-504 (Souter, J., dissenting, joined by Rehnquist, C.J., and Scalia, J); *United Foods*, 533 U.S. at 429-431 (Breyer, J., dissenting, joined by O'Connor and Ginsburg, JJ.).

B. Respondents' contention (Br. 45-50) that the Beef Act does not satisfy intermediate scrutiny is incorrect. Respondents do not question the importance of the government purpose to strengthen an industry important to the national economy. Nor do they dispute that advertising beef will increase demand for that product. Instead, respondents

challenge the government's interest in compelling beef producers to fund the advertising program through assessments on the sale of cattle. *Id.* at 46-49.

That method of funding, however, responds directly to a well established collective action/free rider problem. Although all beef producers benefit from generic advertising promoting beef, no individual producer benefits enough to justify paying for advertising on which other producers would be free riders. That free rider problem is a well recognized phenomenon. Mancur Olson, *The Logic of Collective Action* 43-48 (1971); see Brief of Cal. Agricultural Issues Forum as Amicus Curiae 18-23. And the evidence in this case confirms the existence of that problem. J.A. 168. Respondents are incorrect in asserting (Br. 46-47) that the interest in avoiding a collective action/free rider problem is a *post hoc* rationalization. Congress was well aware that, for the program to work, assessments would have to be mandatory rather than voluntary. See 131 Cong. Rec. 33,029 (1985) (statement of Sen. DeConcini) ("Only a united industry, supported by all producers, can survive in these challenging times."); *ibid.* ("Under this system all producers benefit, and it is only fair that all producers should share the cost.").

C. Respondents argue that Congress was required to achieve its objective through the "less restrictive alternative" of a tax on the general public. Resp. Br. 49. But intermediate scrutiny does not require Congress to adopt the least restrictive means. All that is required is "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556 (2001) (internal quotation marks omitted). That standard is satisfied here because beef producers pay assessments in direct proportion to their sales of beef, and therefore in direct proportion to the degree to which Congress could reasonably conclude that they benefit from advertising and promotion under the Beef Act.

Moreover, it is not obvious why a more widely imposed tax is less restrictive in any sense relevant to the First Amendment. If a government program addresses a legitimate problem, like the collective action/free rider problem, it not clear why the funding mechanism for that program should be critical. Certainly nothing in the First Amendment should preclude congressional efforts to match the benefits of a program with a stream of revenues.

Finally, Congress had substantial reasons for preferring a targeted assessment to a tax on the general public. Congress could reasonably decide that it was more equitable to impose the costs of the Beef Act on those who would most directly benefit. Congress's approach also helped to ensure the support and participation of an industry that was reluctant to take public handouts. *United States* v. *Frame*, 885 F.2d 1119, 1135 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). And Congress's approach avoided the risk that a tax on the general public would reduce the public support that was necessary for the success of the program.[5]

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For the foregoing reasons, as well as those set forth in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

NOVEMBER 2004

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[5] Respondents contend (Br. 20) that the Beef Act not only violates their First Amendment right to free speech, but also their First Amendment right to free association. That claim, however, is based on the same basic theory as their free speech claim—that the government may not compel individuals to provide financial support for speech to which they object. Respondents' free association claim therefore adds nothing to their free speech claim and fails for the same reasons. The Beef Act is constitutional both because it is justified under the government speech doctrine and because it satisfies intermediate scrutiny.